

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 20 November 2015

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public with one public annex

**Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission
of prior recorded testimony of P-0022, P-0041 and P-0103**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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Amicus Curiae

REGISTRY

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Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 51(4), 64(2) and (9)(a), 67, and 69(2) and (4) of the Rome Statute ('Statute') and Rules 63(2) and 68(2)(c) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103'.

I. Procedural history

1. On 28 June 2015, the Office of the Prosecutor ('Prosecution') filed a request for admission of the prior recorded testimony, and associated documents, of three deceased witnesses P-0022, P-0041 and P-0103 ('Documents'), pursuant to Rule 68(2)(c) of the Rules ('Request').¹ Additionally, or alternatively, the Prosecution seeks their admission on the basis of Articles 64(9)(a) and 69(2) and (4) of the Statute and Rule 63(2) of the Rules ('Alternative Request').²
2. On 9 July 2015, the defence team for Mr Ntaganda ('Defence') filed an urgent motion requesting an extension of deadline for the response to the Request.³ On 10 July 2015, the Chamber granted an extension until 20 July 2015.⁴
3. On 20 July 2015, the Defence submitted its response ('Response') in which it opposes the Request.⁵

¹ Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses – P-22, P-41 and P-103, ICC-01/04-02/06-659, with confidential annexes 1-2, A1-A17, B1-B62, C1-C4 and D. The Documents are identified in Annex 1 to Request (ICC-01/04-02/06-659-Conf-Anx1).

² Request, ICC-01/04-02/06-659, paras 4 and 38.

³ Urgent motion on behalf of Mr Ntaganda seeking a limited variation of the time limit to respond to the 'Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103', ICC-01/04-02/06-706-Conf-Exp. Confidential *ex parte* redacted, available to the Prosecution (ICC-01/04-02/06-706-Conf-Exp-Red) and public redacted (ICC-01/04-02/06-706-Red2) versions were notified on 10 July 2010. The public redacted version was subsequently reclassified as confidential *ex parte* (ICC-01/04-02/06-Conf-Exp-Red2). See Request on behalf of Mr Ntaganda seeking the removal of Defence filing ICC-01/04-02/06-706-Red2 from the record and leave to file a new public redacted version of this submission, 13 July 2015, ICC-01/04-02/06-712-Conf-Exp; and e-mail from Trial Chamber VI Communications to the parties on 21 July 2015 at 17:33.

⁴ E-mail from a Legal Officer of the Chamber to the parties on 10 July 2015 at 16:03.

4. On 27 July 2015, the Prosecution sought leave to reply to the Response.⁶ The Chamber granted leave to reply in respect of: i) the admission of documents associated with the prior recorded testimony; and ii) the Defence's challenge to the admissibility of P-0022's first statement.⁷
5. On 27 August 2015, the Prosecution filed its reply on the two above-mentioned issues.⁸
6. On 9 September 2015, the Prosecution submitted additional evidence concerning P-0022 in support of the Request ('Supplementary Filing').⁹

II. Preliminary legal issues

7. The Prosecution submits that admitting the documents under the amended Rule 68 complies with Article 51(4) of the Statute, because its application is neither retroactive nor detrimental to the accused.¹⁰ It submits that Rule 68 is not being applied retroactively, as the request to admit the Documents is being made after the amended Rule 68 came into effect, and the Prosecution had never previously tried to admit the Documents in this case.¹¹
8. The Prosecution also argues that the application of Rule 68 is not detrimental to the accused, submitting, *inter alia*, that: (i) the Documents have been disclosed to the Defence since 2013, and there has been 'ample notice' that the

⁵ Response on behalf of Mr Ntaganda to the "Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103", ICC-01/04-02/06-736-Conf-Exp.

⁶ Prosecution request to file a reply to the "Response on behalf of Mr Ntaganda to the 'Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103'", ICC-01/04-02/06-736-Conf-Exp, notified on 28 July 2015, ICC-01/04-02/06-751-Conf-Exp. This filing was reclassified 'public' on 16 November 2015.

⁷ E-mail from a Legal Officer of the Chamber to the parties on 20 August 2015 at 13:43.

⁸ Prosecution reply to the "Response on behalf of Mr Ntaganda to the 'Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103'", ICC-01/04-02/06-736-Conf-Exp, ICC-01/04-02/06-796-Conf, with one confidential annex. A public redacted version was filed on 16 November 2015 (ICC-01/04-02/06-796-Red).

⁹ Prosecution Submission of Additional Evidence concerning Witness P-22 in support of "Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103" ICC-01/04-02/06-659, ICC-01/04-02/06-812, with a confidential, *ex parte*, annex. A confidential redacted version of the annex was filed simultaneously (ICC-01/04-02/06-812-Conf-AnxA-Red).

¹⁰ Request, ICC-01/04-02/06-659, para. 26.

¹¹ Request, ICC-01/04-02/06-659, paras 27 and 31.

Prosecution was relying on them as incriminatory evidence; (ii) the Defence will still have the opportunity to test the evidence by means other than cross-examination of the deceased witnesses; (iii) Rule 68 may be used by both the Prosecution and the Defence; and (iv) the Documents would have been admissible under other provisions prior to the amendment of Rule 68.¹² The Prosecution additionally contends that, because Rule 68 is concerned with procedural rather than substantive law, any alleged detriment should be ‘strictly construed’.¹³

9. The Defence makes no submissions regarding the impact of Article 51(4) of the Statute.
10. The Chamber notes that the Assembly of States Parties amended Rule 68 of the Rules on 27 November 2013.¹⁴ The current Rule 68(2)(c), permitting the introduction of prior recorded testimony of unavailable witnesses, under specific circumstances, was introduced by way of that amendment. The Chamber recalls that, pursuant to Article 51(4) of the Statute, amendments to the Rules must not be applied retroactively to the detriment of a person who is being investigated or prosecuted or who has been convicted.
11. The Chamber confirms that it does not consider that the Request would give rise to a retroactive application of Rule 68(2)(c) to the detriment of the accused, within the meaning of Article 51(4) of the Statute, or would otherwise offend principles of legality.¹⁵ Rule 68(2)(c) is a rule of neutral application which came into force prior to the commencement of the trial in this case. Moreover, the Prosecution is tendering the Documents for the first time and the Chamber

¹² Request, ICC-01/04-02/06-659, paras 28-29 and 32-36.

¹³ Request, ICC-01/04-02/06-659, para. 37.

¹⁴ ICC-ASP/12/Res.7.

¹⁵ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Red-Corr (‘Ruto Rule 68 Decision’), paras 23-26.

observes that the Defence has not contested the applicability, in principle, of Rule 68(2)(c) to this case.

III. Applicable law

12. Under Rule 68(2)(c) of the Rules, the Chamber may, after having heard the parties, allow the introduction of previously recorded testimony coming from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally, provided that: i) the introduction is not prejudicial to or inconsistent with the rights of the accused;¹⁶ ii) the necessity of measures under Article 56 of the Statute could not be anticipated; and iii) the prior recorded testimony has sufficient indicia of reliability.
13. The Chamber also recalls that, under Rule 68(2)(c)(ii) of the Rules, 'the fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it'.
14. The above requirements are to be assessed on a case-by-case basis and the impact of any request on the fairness of the proceedings more generally should be considered.¹⁷
15. In addition, the Chamber considers that Article 69 of the Statute is relevant in this context¹⁸ and therefore that the relevance and probative value of the prior recorded testimonies vis-à-vis any prejudice that admission may cause to a fair

¹⁶ Rule 68(1) of the Rules and Article 69(2) of the Statute.

¹⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', ICC-01/05-01/08-1386 OA5 OA6 ('Bemba Appeals Judgment'), para. 78.

¹⁸ Article 69(2) and (4) of the Statute.

trial or to a fair evaluation of the testimony of a witness should also be taken into consideration.¹⁹

IV. Request

A. P-0022

16. The Prosecution seeks the admission, under Rule 68(2)(c) of the Rules, of the prior recorded testimony of P-0022, as well as associated documents. This consists of a statement taken by the Prosecution in 2005,²⁰ 14 photographs taken by a non-governmental organisation ('NGO')²¹ and one statement given to the same NGO one month prior to P-0022's interview with the Prosecution.²² In support of its request, the Prosecution submits that: i) P-0022 has died since she provided her statement;²³ ii) it could not have anticipated the need to rely on Article 56 of the Statute;²⁴ and iii) the information P-0022 provided is reliable.²⁵

Whether the witness is unavailable to testify orally

17. The Prosecution submits that P-0022 died subsequent to providing a witness statement. As a proof of her death, it initially provided a 2005 report signed by the chief of P-0022's *localité*.²⁶ In its Supplementary Filing, the Prosecution submitted a further statement of September 2015 by the same individual, in which he testifies to seeing P-0022's body and assisting in her burial.²⁷

¹⁹ Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 36. *See also*, Ruto Rule 68 Decision, ICC-01/09-01/11-1938-Red-Corr, paras 65 and 150.

²⁰ Annex A.3. to Request: ICC-01/04-02/06-659-Conf-AnxA3.

²¹ Annexes A.4. to A.17. to Request: ICC-01/04-02/06-659-Conf-AnxA4; ICC-01/04-02/06-659-Conf-AnxA5; ICC-01/04-02/06-659-Conf-AnxA6; ICC-01/04-02/06-659-Conf-AnxA7; ICC-01/04-02/06-659-Conf-AnxA8; ICC-01/04-02/06-659-Conf-AnxA9; ICC-01/04-02/06-659-Conf-AnxA10; ICC-01/04-02/06-659-Conf-AnxA11; ICC-01/04-02/06-659-Conf-AnxA12; ICC-01/04-02/06-659-Conf-AnxA13; ICC-01/04-02/06-659-Conf-AnxA14; ICC-01/04-02/06-659-Conf-AnxA15; ICC-01/04-02/06-659-Conf-AnxA16; and ICC-01/04-02/06-659-Conf-AnxA17.

²² Annex A.2. to Request, ICC-01/04-02/06-659-Conf-AnxA2.

²³ Request, ICC-01/04-02/06-659, para. 6.

²⁴ Request, ICC-01/04-02/06-659, paras 7-8.

²⁵ Request, ICC-01/04-02/06-659, paras 9 and 11-13.

²⁶ Annex A.1 to Request, ICC-01/04-02/06-659-Conf-AnxA1.

²⁷ Annex A to Supplementary Filing, ICC-01/04-02/06-812-Conf-AnxA-Red, paras 9-10.

18. In its Response, the Defence contests the unavailability of P-0022 as it considers that her death is not satisfactorily established.²⁸ It informs the Chamber that it came across information indicating that she may not be deceased but that, in the absence of a team of investigators, it was not able to verify this information.²⁹ The Defence also challenges the reliability and authenticity of the 2005 report, and stresses that the identity of the signatory is unknown to the Defence.³⁰

19. In light of the information before it, and recalling that the Prosecution provided the Defence with the identity of the individual who provided the information about P-0022's death,³¹ the Chamber considers that there is sufficient indication that P-0022 has died and is therefore satisfied that she is unavailable to testify orally.

Whether the necessity of measures under Article 56 of the Statute could have been anticipated

20. The Chamber notes that the Prosecution submits P-0022's death was unexpected and sudden,³² and observes that the Defence made no specific submission in this regard. The Chamber finds that there is no indication that the necessity of measures under Article 56 could have been anticipated by the Prosecution.

Whether the prior recorded testimony has sufficient indicia of reliability

21. The Prosecution submits that the statement of P-0022 taken by the Prosecution, the statement taken by an NGO, as well as her 14 photographs, 'bear *prima facie* indicia of reliability because they are truthful, authentic, consistent and were

²⁸ Response, ICC-01/04-02/06-736-Conf-Exp, paras 11-14.

²⁹ Response, ICC-01/04-02/06-736-Conf-Exp, para. 11.

³⁰ Response, ICC-01/04-02/06-736-Conf-Exp, paras 12-13.

³¹ Confidential redacted version of Annex A to Supplementary Filing, ICC-01/04-02/06-812-Conf-AnxA-Red. See also, Supplementary Filing, ICC-01/04-02/06-812, para. 8.

³² Request, ICC-01/04-02/06-659, paras 7-8; Annex A.1. to the Request, ICC-01/04-02/06-659-Conf-AnxA1; Annex A to Supplementary Filing, ICC-01/04-02/06-812-Conf-AnxA-Red.

provided voluntarily'.³³ The two statements are, in its view, consistent internally and with each other.³⁴

22. The Defence submits that the prior recorded testimony of P-0022 has a very low indicia of reliability and does not fulfil the requirements of Rule 68(2)(c) of the Rules.³⁵ In its Response, it contends notably that P-0022's statement to the Prosecution did not endorse two important facts provided previously to the NGO and submits that these inconsistencies 'strike at the heart of the accuracy, truthfulness and trustworthiness of the statement'.³⁶ The Defence also notes that P-0022 did not report to the NGO having been raped during her capture, while this event is discussed in her statement to the Prosecution.³⁷
23. From the outset, the Chamber clarifies that, while it does not exclude the possibility that prior recorded testimony could be taken by an entity other than one of the parties to the proceedings, it will consider the introduction of the statement given by P-0022 to the NGO as an associated document and not as a prior recorded testimony in and of itself. In this regard, the Chamber notes that her statement to the Prosecution refers to her statement to the NGO,³⁸ as well as the fourteen photographs.³⁹ As these fifteen documents are used and explained by P-0022 in her prior recorded testimony and are necessary to understand P-0022's testimony,⁴⁰ the Chamber finds that they are to be considered for introduction under Rule 68(2)(c) of the Rules, as accompanying documents to P-0022's prior testimony.
24. In conducting its assessment of the reliability of P-0022's prior recorded testimony under Rule 68(2)(c) of the Rules, the Chamber has taken into

³³ Request, ICC-01/04-02/06-659, para. 11.

³⁴ Request, ICC-01/04-02/06-659, para. 12.

³⁵ Response, ICC-01/04-02/06-736-Conf-Exp, paras 17-28.

³⁶ Response, ICC-01/04-02/06-736-Conf-Exp, para. 21 referring to Annex A.2.

³⁷ Response, ICC-01/04-02/06-736-Conf-Exp, paras 24-25 referring to Annex A.3., para. 35.

³⁸ Annex A.3. to Request, ICC-01/04-02/06-659-Conf-AnxA3, para. 14

³⁹ Annex A.3. to Request, ICC-01/04-02/06-659-Conf-AnxA3, para. 49.

⁴⁰ Ruto Rule 68 Decision, ICC-01/09-01/11-1938-Red-Corr, para. 33.

consideration, *inter alia*, the fact that: i) her testimony was given in the presence of a qualified interpreter; ii) P-0022 applied her fingerprint on her statement, which was also signed by the investigators present; iii) P-0022 also put her fingerprint on an acknowledgement annexed to her statement, which states that the latter was given voluntarily, that it correctly reflects her deposition, and that it may be used in legal proceedings before the Court; and iv) her statement is internally coherent and consistent with the fourteen associated photographs. As for the two inconsistencies in P-0022's statements as raised by the Defence, the Chamber notes that they were both explained in P-0022's statement to the Prosecution.⁴¹

25. In light of the above, the Chamber is of the view that P-0022's prior recorded testimony bears sufficient indicia of reliability, as required under Rule 68(2)(c) of the Rules.

Whether any prejudicial effect outweighs the probative value of the prior recorded testimony

26. Turning now to the Defence's argument that the probative value of P-0022's prior recorded testimony is significantly outweighed by its prejudicial effect,⁴² the Chamber notes that P-0022 mainly testifies to the attack on the Banyali-Kilo *collectivité* and the commission of crimes by UPC soldiers. The Chamber does not find that her testimony is so proximate to the accused, as contended by the Defence,⁴³ that it would be unfair to allow its admission under Rule 68(2)(c) of the Rules. In the Chamber's view, it does not appear that P-0022's testimony goes to the acts and conduct of the accused or otherwise addresses matters so proximate to the accused as to require its exclusion.

⁴¹ Annex A.3. to Request, ICC-01/04-02/06-659-Conf-AnxA3, para 14.

⁴² Response, ICC-01/04-02/06-736-Conf-Exp, paras 39-45.

⁴³ Response, ICC-01/04-02/06-736-Conf-Exp, paras 41 and 73.

27. Moreover, the Chamber considers the material to be relevant and in light of the Chamber's analysis related to the indicia of reliability of the prior recorded testimony of P-0022, the Chamber considers that its *prima facie* probative value outweighs any prejudicial effect to the accused caused by its introduction. In this regard, it notes that introduction is without prejudice to the weight, if any, which will be attached to the evidence admitted and agrees with Trial Chamber V(A) in that

[w]hen analysing this prior recorded testimony in an eventual decision on the guilt or innocence of the accused, the Chamber will weigh its probative value and reliability, considering the nature of the evidence provided by the witnesses, particularly if it is direct or hearsay evidence, whether the prior recorded testimonies go to the acts and conduct of the accused, and whether the evidence contained therein is corroborated by any other evidence admitted into the record.⁴⁴

Conclusion

28. In light of the above, and having found all requirements of sub-rule (2)(c) of Rule 68 and Article 69(4) to be met, the Chamber decides to admit into evidence the prior recorded testimony of P-0022, together with the relevant associated documents.

B. P-0041

29. The Prosecution seeks the introduction under Rule 68(2)(c) of the Rules of the prior recorded testimony of P-0041, a witness who testified in-court in the context of the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga case'), as well as associated documents. His prior recorded testimony consists of one statement taken by the Prosecution in 2005 and 2006,⁴⁵ as well as the French and English transcripts of his 3-day oral testimony of 11, 12 and 13 February 2009

⁴⁴ Ruto Rule 68 Decision, ICC-01/09-01/11-1938-Corr-red2, paras 60, 81, 111 and 128.

⁴⁵ Annex B.3. to Request: ICC-01/04-02/06-659-Conf-AnxB3.

before Trial Chamber I.⁴⁶ The associated documents consist of 47 documents provided by P-0041 to the Prosecution, which are all discussed in his statement, and 10 of which were also discussed during his in-court testimony, as well as six documents not provided by him, but presented to him during his in-court testimony and tendered into evidence in the *Lubanga* case. The Prosecution submits that: i) P-0041 has died since he testified before Trial Chamber I;⁴⁷ ii) the need to rely on Article 56 of the Statute could not have been anticipated;⁴⁸ and iii) the evidence P-0041 provided is reliable.⁴⁹

Whether the witness is unavailable to testify orally

30. In support of its submissions that P-0041 has died since his in-court testimony in 2009,⁵⁰ the Prosecution provides two medical certificates attesting of the recent death of P-0041.⁵¹ Noting that the Defence does not challenge the documents establishing the death of Witness P-0041,⁵² the Chamber is satisfied that P-0041 is unavailable to testify since it has been presented with sufficient information establishing that he has died.

Whether the necessity of measures under Article 56 of the Statute could have been anticipated

31. The Chamber notes the Prosecution's submission that P-0041's death was unexpected and sudden⁵³ and observes that the Defence made no specific submissions in this regard. Accordingly, noting the Prosecution's submissions

⁴⁶ Annexes B.4. to B.9. to Request: ICC-01/04-02/06-659-Conf-AnxB4; ICC-01/04-02/06-659-Conf-AnxB5; ICC-01/04-02/06-659-Conf-AnxB6; ICC-01/04-02/06-659-Conf-AnxB7; ICC-01/04-02/06-659-Conf-AnxB8; and ICC-01/04-02/06-659-Conf-AnxB9.

⁴⁷ Request, ICC-01/04-02/06-659, para. 6; Annexes B.1. and B.2. to Request: ICC-01/04-02/06-659-Conf-AnxB1; and ICC-01/04-02/06-659-Conf-AnxB2.

⁴⁸ Request, ICC-01/04-02/06-659, paras 7-8.

⁴⁹ Request, ICC-01/04-02/06-659, paras 9 and 14-15.

⁵⁰ Request, ICC-01/04-02/06-659, paras. 6.

⁵¹ Annexes B.1. and B.2. to Request, ICC-01/04-02/06-659-Conf-AnxB1; and ICC-01/04-02/06-659-Conf-AnxB2.

⁵² Response, ICC-01/04-02/06-736-Conf-Exp, para. 46.

⁵³ Request, ICC-01/04-02/06-659, paras 7-8; Annexe B.1. to Request, ICC-01/04-02/06-659-Conf-AnxB1.

that it was not aware of P-0041's pre-existing medical condition,⁵⁴ the Chamber is satisfied that the necessity of measures under Article 56 could not reasonably have been anticipated.

Whether the prior recorded testimony has sufficient indicia of reliability

32. The Prosecution submits that Witness P-0041's statement was 'truthful, voluntary, internally consistent and consistent with his subsequent in-court testimony',⁵⁵ and notes that he acknowledged when he did not know something.⁵⁶ The Prosecution also recalls that P-0041 testified under oath before Trial Chamber I and, during his testimony, again admitted when he was unsure and couldn't answer because he did not know.⁵⁷ It further submits that his credibility was tested in cross-examination by the defence team for Mr Lubanga.⁵⁸
33. The Defence submits that P-0041's statement and his in-court testimony are not admissible because they do not bear sufficient indicia of reliability.⁵⁹ It notably submits that his statement was not given under oath and, even though he was cross-examined by the Lubanga defence team during his in-court testimony, the cross-examination 'focused solely on the facts and issues relevant to that case.'⁶⁰
34. In conducting its assessment of the reliability of P-0041's prior recorded testimony under Rule 68(2)(c) of the Rules, the Chamber has taken into consideration, *inter alia*, the fact that: i) his statement to the Prosecution was signed, and stated to have been given voluntarily; ii) his statement is internally coherent and consistent with his in-court testimony given three years later, as well as with the 53 associated documents; iii) P-0041's in-court testimony was

⁵⁴ Request, ICC-01/04-02/06-659, para. 8.

⁵⁵ Request, ICC-01/04-02/06-659, para. 14.

⁵⁶ Request, ICC-01/04-02/06-659, para. 14.

⁵⁷ Request, ICC-01/04-02/06-659, para. 15.

⁵⁸ Request, ICC-01/04-02/06-659, para. 15.

⁵⁹ Response, ICC-01/04-02/06-736-Conf-Exp, paras 47-52.

⁶⁰ Response, ICC-01/04-02/06-736-Conf-Exp, paras 48 and 51.

given under oath; iv) he was cross-examined in court; and v) he admitted when he was unsure or couldn't answer a question because he did not know.⁶¹

35. As for the associated items, the Chamber notes that the 47 documents provided by P-0041 to the Prosecution are all discussed in his statement.⁶² It further observes that 10 of these 47 documents have been referred to in the course of his in-court testimony.⁶³ As to the other six documents sought to be admitted as associated documents in the present case, they were all presented to P-0041, recognised and discussed during his in-court testimony before Trial Chamber I. Having carefully reviewed P-0041's prior recorded testimony, and since P-0041 has used and explained each document in his prior recorded testimony, the Chamber finds that they are to be considered for introduction under Rule 68(2)(c) of the Rules, together with P-0041's prior testimony.⁶⁴

36. In light of the above, the Chamber is of the view that P-0041's prior recorded testimony bears sufficient indicia of reliability, as required under Rule 68(2)(c) of the Rules.

Whether any prejudicial effect outweighs the probative value of the prior recorded testimony

37. The Chamber now turns to the Defence's argument that the probative value of P-0041's prior recorded testimony is significantly outweighed by its prejudicial effect since it goes to the acts and conduct of the accused.⁶⁵ The Chamber agrees with the Defence in that the testimony goes to proof of acts and conduct of the

⁶¹ See Annex B.3., para. 228; Annex B.4., page 81, line 22 to page 82, line 1; Annex B.6., page 20, lines 15-20; page 24, lines 21-24; and page 25, lines 13-18; Annex B.8., page 6, lines 1-4; and page 34, line 17.

⁶² The Chamber has relied on the references as listed in Annex D. to Request (ICC-01/04-02/06-Conf-AnxD), but has not limited its assessment to the references listed therein as they were found insufficient. In addition, the Chamber has considered, for Annex B.36., Annex B.3., para. 113; for Annex B.37., Annex B.3., para. 127; for Annex B.38., Annex B.3., para. 117; for Annex B.48., Annex B.3., para. 75; for Annex B.49., Annex B.3., para. 49; for Annex B.50., Annex B.3., para. 49; for Annex B.51., Annex B.3., para. 47; and for Annex B.56., Annex B.3., paras 218 and 154-155.

⁶³ These documents have been correctly identified by way of an asterisk at Annex 1. to Request: ICC-01/04-02/06-659-Conf-Anx1, pages 3-4.

⁶⁴ See Ruto Rule 68 Decision, ICC-01/09-01/11-1938-Red-Corr, para. 33.

⁶⁵ Response, ICC-01/04-02/06-736-Conf-Exp, paras 53-59.

accused, including by addressing Mr Ntaganda's alleged involvement in the training of child soldiers in Mandro, the murder of a priest in Mongwalu and acts of pillaging.⁶⁶ The Chamber however notes that, as acknowledged by the Defence,⁶⁷ Rule 68(2)(c) does not prohibit the introduction of a testimony which goes to proof of acts and conduct of the accused but merely stipulates that it is a fact that 'may be a factor against [the prior recorded testimony's] introduction, or part of it'.

38. In light of the Chamber's analysis related to the indicia of reliability of the prior recorded testimony of P-0041, the Chamber considers that the testimony's *prima facie* probative value outweighs any prejudicial effect caused to the accused by its introduction. In this regard, it recalls, as noted above,⁶⁸ that introduction is without prejudice to the weight, if any, which will be attached to the evidence admitted.

Conclusion

39. In light of the above, and having found all requirements of sub-rule (2)(c) of Rule 68 and Article 69(4) to be met, the Chamber decides to admit into evidence the prior recorded testimony of P-0041, together with the relevant associated documents.

C. P-0103

40. The Prosecution seeks the admission of the prior recorded testimony of P-0103, as well as associated documents. This consists of a statement taken by the Prosecution in 2005⁶⁹ and two signed sketches by P-0103, discussed in his

⁶⁶ See, for example, Annex B.3. to Request, ICC-01/04-02/06-659-Conf-AnxB3 at 0005-0006, paras 24 and 25; at 0007, para 32; at 0008-0009, para. 39; at 0014, para. 71; at 0020, paras 109 and 110; at 0028, para 166; and at 0029, para. 173; Annex B.6. to Request, ICC-01/04-02/06-659-Conf-AnxB6 at 5201, page 3, lines 9-10; at 5250, page 52, lines 6-10; and at 5261-5262, pages 63, line 18 to page 64, line 24.

⁶⁷ Response, ICC-01/04-02/06-659-Conf-Exp, para. 45.

⁶⁸ See above para. 27.

⁶⁹ Annex C.2. to Request, ICC-01/04-02/06-659-Conf-AnxC2.

statement.⁷⁰ In support of its request, the Prosecution submits that: i) P-0103 has died since he provided his statement;⁷¹ ii) it could not have anticipated the need to rely on Article 56 of the Statute;⁷² and iii) the evidence P-0103 provided is reliable.⁷³

Whether the witness is unavailable to testify orally

41. The Prosecution submits that P-0103 died subsequent to providing a witness statement. As a proof of his death, the Prosecution provides a statement from someone said to have been P-0103's wife explaining the causes and the circumstances of P-0103's death.⁷⁴
42. In its Response, the Defence contests the unavailability of P-0103 as it considers that his death was not 'satisfactorily established'.⁷⁵ It submits that the Prosecution failed to provide a death certificate and instead provides a statement 'not given under oath' and obtained four years and a half after the alleged death.⁷⁶
43. The Majority notes that P-0103's alleged wife indicated in her statement to the Prosecution that the hospital did not give her a death certificate, but that if she went and asked, 'they may provide it'.⁷⁷ Moreover, the Chamber also notes that the statement indicates that the doctors who treated P-0103 are still at the hospital.⁷⁸ In this regard, the Majority observes that the Prosecution does not justify why it does not provide the Chamber with a death certificate, nor does it indicate whether or not it attempted to do so. In light of the reported

⁷⁰ Annexes C.3. and C.4. to Request, ICC-01/04-02/06-659-Conf-C3; and ICC-01/04-02/06-659-Conf-AnxC4.

⁷¹ Request, ICC-01/04-02/06-659, para. 6; and Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1.

⁷² Request, ICC-01/04-02/06-659, paras 7-8; and Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, para. 13.

⁷³ Request, ICC-01/04-02/06-659, paras 9 and 16.

⁷⁴ Request, ICC-01/04-02/06-659, para. 6; and Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, paras 12-13.

⁷⁵ Response, ICC-01/04-02/06-736-Conf-Exp, paras 65-68.

⁷⁶ Response, ICC-01/04-02/06-736-Conf-Exp, paras 66 and 68.

⁷⁷ Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, para. 14.

⁷⁸ Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, para. 14.

circumstances of the alleged death of P-0103, and before rendering its decision as to whether or not P-0103's death has been sufficiently established, the Majority finds it appropriate to invite the Prosecution to further substantiate its allegation.⁷⁹

D. Alternative request

44. Having deferred its decision as to the admissibility of P-0103's prior recorded testimony under Rule 68(2)(c) of the Rules, the Majority will now addresses the Prosecution's Alternative Request. The Prosecution alternatively submits that the Documents are admissible under Articles 69(2) and (4) and 64(9)(a) of the Statute and Rule 63(2) of the Rules, emphasising the Chamber's broad discretion to freely assess the relevance or admissibility of any, and all, items of evidence.⁸⁰
45. The Defence opposes the Alternative Request arguing that Rule 68 applies as a *lex specialis*. The Defence submits that the requirements of Rule 68 are 'in addition to assessing [the] general impact' of admission as would be done under Articles 64(9)(a) and 69(2) and (4) and Rule 63(2). It submits that Rule 68 cannot be circumvented by relying solely on these other more general, and less restrictive, provisions pertaining to the admission of evidence.⁸¹
46. As noted by the Appeals Chamber, both the first and second sentences of Article 69(2) of the Statute indicate exceptions to the general rule that witnesses 'must appear before the Trial Chamber in person and give their evidence orally'.⁸² These exceptions exist where measures pursuant to Article 68(1) of the Statute are required, or to otherwise permit the introduction of 'documents or written transcripts, subject to [the] Statute and in accordance with the [Rules]'.

⁷⁹ The Chamber observes that neither a death certificate nor evidence of the spousal relationship between P-0103 and the signatory of the statement has been provided.

⁸⁰ Request, ICC-01/04-02/06-659, paras 4 and 38-47. *See also* paras 33-36.

⁸¹ Response, ICC-01/04-02/06-736-Conf-Exp, paras 76-81.

⁸² Bemba Appeals Judgment, ICC-01/05-01/08-1386 OA5 OA6, paras 76-77.

In this regard, Rule 68 is the ‘most relevant provision’ enabling the introduction of prior recorded testimony, subject to strict conditions.⁸³ Considering the Documents at issue in the Request, in the Majority’s view, Rule 68 should be considered as *lex specialis* and, where the conditions of that rule are not met, resort to broader powers would be inappropriate in the circumstances to introduce documents for the truth of their contents.⁸⁴ The Majority therefore decides to reject the Alternative Request.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY, UNANIMOUSLY
PARTIALLY GRANTS the Request;

ADMITS INTO EVIDENCE the prior recorded testimonies of P-0022 and P-0041, together with all associated documents;

ORDERS the Prosecution to file submissions on the appropriate classification level for the documents hereby admitted by 2 December 2015;

DIRECTS the Registry to modify the metadata of all exhibits admitted pursuant to the present decision, including by indicating their status as evidence admitted as well as noting that they have been admitted by way of the present decision;

ORDERS the Defence to file a public redacted version of ICC-01/04-01/06-736-Conf-Exp, and the Prosecution of ICC-01/04-02/06-796-Conf-AnxA; and

⁸³ Bemba Appeals Judgment, ICC-01/05-01/08-1386 OA5 OA6, para. 77.

⁸⁴ See also Ruto Rule 68 Decision, ICC-01/09-01/11-1938-Corr-red2, para. 149; ICTY, Appeals Chamber, *The Prosecutor v. Stanislav Galić*, Decision on interlocutory appeal concerning Rule 92bis(C), 7 June 2002, IT-98-29-AR73.2, para. 31.

BY MAJORITY,

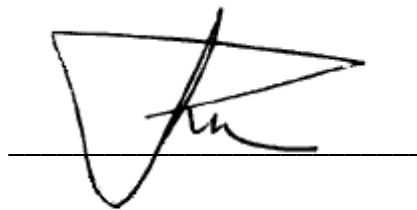
DEFERS its ruling on the part of the Request relating to P-0103;

INVITES the Prosecution further substantiate its allegation that P-0103 is dead; and

REJECTS the Alternative Request.

Judge Chang-ho Chung appends a partially dissenting opinion.

Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 20 November 2015

At The Hague, The Netherlands